

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-7088

United States Court of Appeals
FOR THE SECOND CIRCUIT

RICHARD J. STULL,

Plaintiff-Appellant,

against

NICHOLAS H. BAYARD, PAUL L. MILLER, HOWARD PIPER, THOMAS F. PIPER and WILLIAM T. PIPER, JR., individually and as EXECUTORS OF THE ESTATE OF WILLIAM T. PIPER, Deceased, NICOLAS M. SALGO, DAVID W. WALLACE, BANGOR PUNTA CORPORATION and THE FIRST BOSTON CORPORATION,

Defendants-Appellees.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

**JOINT ANSWERING BRIEF FOR
DEFENDANTS-APPELLEES**

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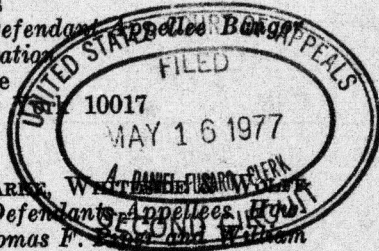
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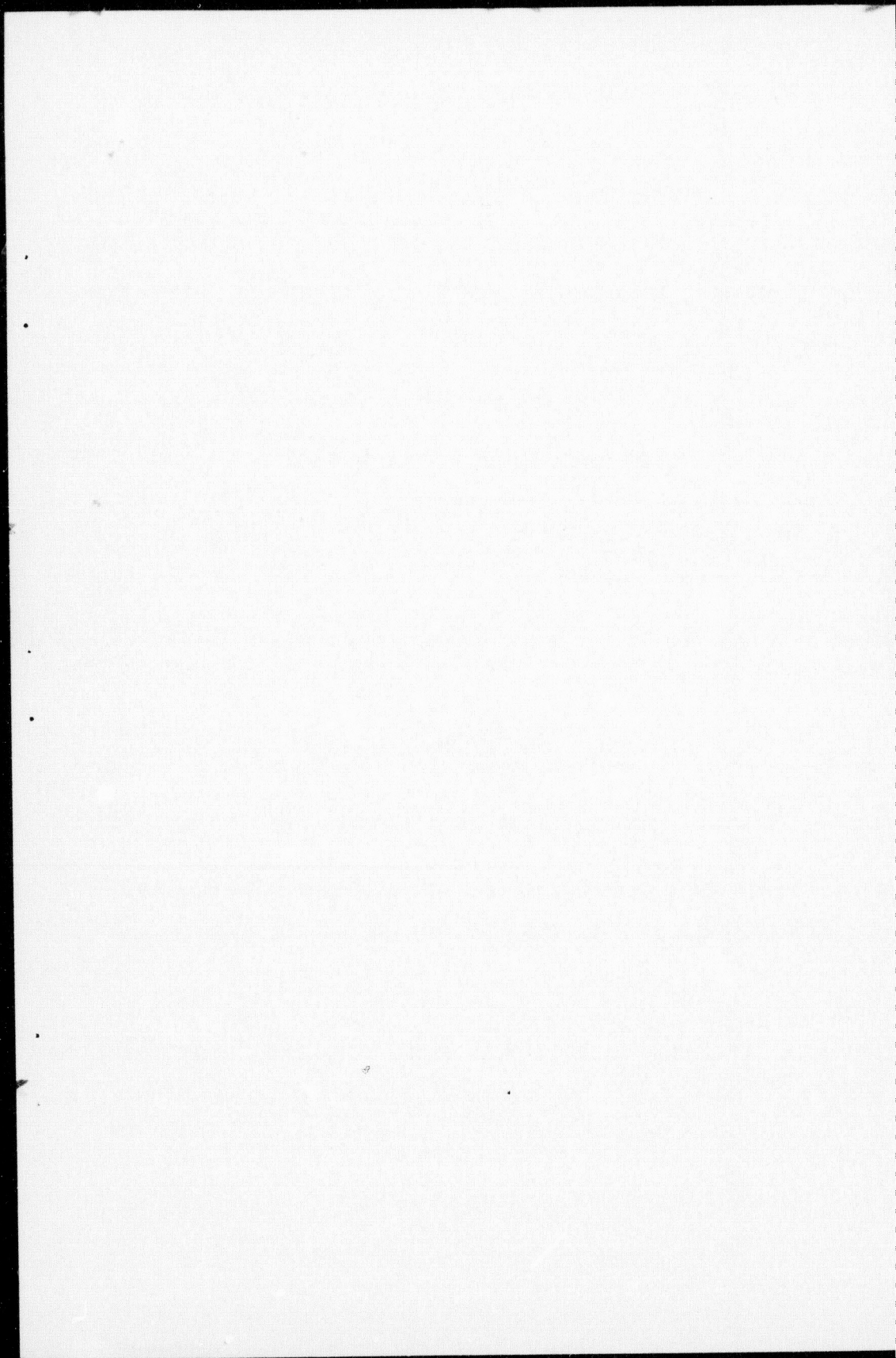


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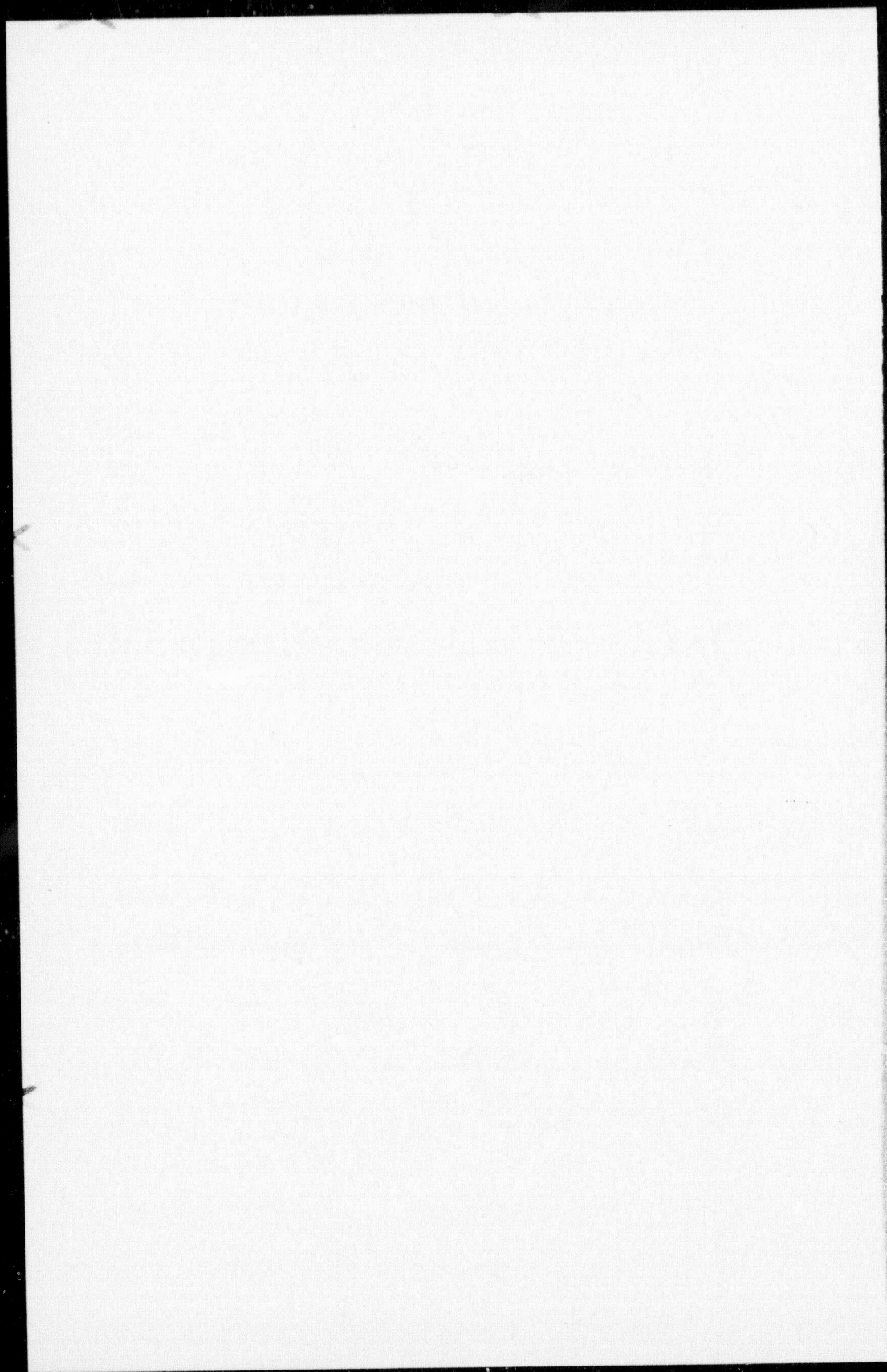
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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-7088

RICHARD J. STULL,

Plaintiff-Appellant,

against

NICHOLAS H. BAYARD, PAUL L. MILLER, HOWARD PIPER, THOMAS F. PIPER and WILLIAM T. PIPER, JR., individually and as EXECUTORS OF THE ESTATE OF WILLIAM T. PIPER, Deceased, NICOLAS M. SALGO, DAVID W. WALLACE, BANGOR PUNTA CORPORATION and THE FIRST BOSTON CORPORATION,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT ANSWERING BRIEF FOR DEFENDANTS-APPELLEES

Issues Presented

1. Should the district court be affirmed because plaintiff's action was commenced after the statute of limitations had expired?
2. Should this action be permitted to continue?

Statement of Case

Plaintiff-Appellant moved before the district court to certify the class and also for partial summary judgment. Defendants-Appellees cross-moved for summary judgment

on several grounds.* The district court (Wyatt, J.) dismissed the action and held that it was barred by the statute of limitations because the last fraudulent act of which appellant complained occurred more than six years before commencement of the action. (424 F. Supp. 937) (CA 419-433).** The district court did not discuss the other grounds urged by the appellees in support of dismissal.

Factual Background

This purported class action arises out of the contest for control of Piper Aircraft Corporation ("Piper") that took place over eight years ago between Chris-Craft Industries, Inc. ("CCI") and Bangor Punta Corporation ("BPC").*** Plaintiff Richard Stull ("Richard"), a Piper shareholder, did not tender to either contestant, and here seeks recovery on the basis that defendants fraudulently dissuaded him from accepting the exchange offer made by CCI in July 1969.

The thrust of Richard's complaint is that he and the members of the purported class were induced not to accept CCI's exchange offer because of: (a) alleged misstatements and omissions of material fact in letters sent out to Piper shareholders over the signature of William T. Piper, Jr.; and (b) an alleged omission of material fact in the BPC prospectus for its July 1969 exchange offer, for which First Boston was the dealer-marager. The complaint

* Defendants are Howard Piper, Thomas F. Piper, William T. Piper, Jr., The First Boston Corporation and Bangor Punta Corporation. None of the other named individual defendants were served with process.

** Pages in the Complete Appendix filed by defendants-appellees will be cited in this manner. On May 6, 1977, this Court granted the motion by defendants-appellees for leave to file an appendix.

*** For a full description of the contest and the ensuing litigation see *Piper v. Chris-Craft Industries, Inc.*, 97 S. Ct. 926 (1977).

seeks to fix liability "by collateral estoppel or *res judicata*" (App. Br., pp. 3-4) based upon the decision in *Chris-Craft Industries, Inc. v. Piper Aircraft Corp.*, 480 F.2d 341 (2d Cir. 1973) ("*Chris-Craft II*"), *cert. denied*, 414 U.S. 910 (1973), *cert. granted*, 425 U.S. 910 (1976), *rev'd*, 97 S.Ct. 926 (1977).*

This is the third action brought by Richard or his wife Lillian concerning the contest for control of Piper, but the first action in which First Boston is a defendant.

In February 1969 Richard, as attorney for his wife Lillian, commenced a derivative action on behalf of Piper entitled *Stull v. Greene* (69 Civ. 440), which alleged that a cash tender offer made by CCI for 300,000 Piper shares at \$65 per share was a "self-dealing operation" to acquire Piper shares "for less than fair value." (CA 305) Between 1969 and 1972, Richard filed four amended complaints in *Stull v. Greene* (CA 309, 321, 333 and 366),** and alleged that CCI's tender and exchange offers to Piper shareholders were "grossly and unconscionably inadequate." (CA 347, 382)

In May 1972 Richard filed a class action on behalf of Lillian entitled *Stull v. Pool* (72 Civ. 2055) which, except

* Richard, in addition, presents a few allegations held not to be meritorious in *Chris-Craft II*, although he apparently hopes as to these also to use principles of collateral estoppel. For example, Richard alleges that a BPC press release and its off-exchange purchases of Piper stock in May 1969 establish liability to the purported class. However, the press release was held to be not misleading, *Chris-Craft II* at 366-67 (2d Cir. 1973), and the off-exchange transactions were fully disclosed in the Bangor Punta prospectus. Further, the purported class here is not claiming damages for buying or selling Piper or BPC shares and, therefore, is not within the protective area of Rule 10b-6. See *Piper v. Chris-Craft Industries, Inc.*, 97 S.Ct. 926, 951 (1977).

** CCI and the Board of Directors of Piper, including the Piper brothers appellees in this action, were defendants from the outset. BPC was added as a defendant by amended and supplemental complaint filed on May 29, 1969.

for certain differences in the party defendants, is virtually identical to the instant action. Contrary to the allegations in *Stull v. Greene*, which Richard was then prosecuting concurrently, the *Pool* action claimed injury on the basis that the alleged class of non-tendering Piper shareholders was dissuaded from accepting the allegedly advantageous CCI offer. After a motion to certify a class in *Stull v. Pool* was denied on April 30, 1974* and an appeal therefrom to this Court was dismissed on October 8, 1974, both *Stull v. Greene* and *Stull v. Pool* were settled.

Richard then commenced this purported class action on August 1, 1975, on behalf of the same class alleged in *Stull v. Pool*, based on alleged violations of Section 14(e) of the Securities Exchange Act of 1934 ("1934 Act").

ARGUMENT

POINT I

Richard's action is barred by the statute of limitations.

Actions under anti-fraud sections of the 1934 Act brought in a federal court sitting in New York are governed by New York's six-year statute of limitations found in New York CPLR § 213(8).** *Klein v. Shields & Company*, 470 F.2d 1344, 1346 (2d Cir. 1972). See *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 210 n.29 (1976).

* 63 F.R.D. 702 (S.D.N.Y. 1974).

** "§ 213—The following actions must be commenced within six years:

* * * *

8. an action based upon fraud; the time within which the action must be commenced shall be computed from the time the plaintiff or the person under whom he claims discovered the fraud, or could with reasonable diligence have discovered it."

In measuring this time period, New York CPLR § 213(8) must be read in conjunction with New York CPLR § 203(f)* which allows an action to be maintained within two years after the actual or imputed discovery of the fraud, if the two-year period expires later than six years from the date when the cause of action for fraud accrued. *Rutland House Associates v. Danoff*, 37 App. Div. 2d 828, 325 N.Y.S.2d 273, 274 (1st Dep't 1971); *Klein v. Shields & Company*, 470 F.2d 1344, 1346 (2d Cir. 1972).

Richard admits that he knew of his claimed "deception" in 1971, when he read the district court opinions in *Chris-Craft II*. (CA 154) Thus, the two-year period of limitations expired in 1973, and the longer period of limitations, which allows a plaintiff six years from the date when the alleged fraud was committed, applies.** The last alleged fraudulent act complained of took place on July 18, 1969, when BPC issued the prospectus for its exchange offer. Thus, the six-year statute expired on July 18, 1975, or some two weeks prior to commencement of this action.

Richard contends that the statute should not start running until August 4, 1969, when the CCI offer expired. His theory is that he was not injured until the last day of his failure to accept the CCI offer. But a cause of action for fraudulent misrepresentation accrues for purposes of

* "§ 203.

(f) *Time computed from actual or imputed discovery of facts. . . .*

[W]here the time within which an action must be commenced is computed from the time when facts were discovered or from the time when facts could with reasonable diligence have been discovered, or from either of such times, the action must be commenced within two years after such actual or imputed discovery or within the period otherwise provided, computed from the time the cause of action accrued, whichever is longer."

** Richard's attempt to provide a six year period from *discovery* of the alleged fraud (App. Br., p. 12) is contrary to New York CPLR §§ 203(f) and 213(8). *Klein v. Shields & Company*, *supra* at 1346.

the limitation of actions when the misrepresentations are made.* *McConkey Realty Corp. v. Wildermuth*, 214 App. Div. 395, 397, 212 N.Y.S. 216, 217 (4th Dep't 1925):

"Where an action for deceit is based upon such a representation fraudulently made, the right of action is said to accrue at the time the fraudulent representation is made."

Rickel v. Levy, 370 F. Supp. 751, 755-56 (E.D.N.Y. 1974); *Gates Rubber Co. v. USM Corporation*, 351 F. Supp. 329, 339 (S.D. Ill. 1972), *rev'd on other grounds*, 508 F.2d 603, 605 n.5 (7th Cir. 1975). See *Northrop v. Hill*, 57 N.Y. 351, 353-354 (1874); Practice Commentary C203:12, 7B *McKinney's Cons. Laws* 125, 127 (1976) ("In general, the cause of action should be deemed to accrue when the defendant commits the act which the law regards as unlawful.")

No act of any appellee after July 18, 1969 is claimed to have defrauded any member of the purported class. The alleged tort was complete on July 18, 1969.** Piper shareholders' damages might be increased by subsequent acts of such shareholders, but their cause of action accrued on July 18, 1969 for purposes of the limitation of actions.

* When a federal court borrows a state statute of limitations it "will follow state decisions as to how far a cause of action must be 'complete' to have 'accrued' under state limitation statutes . . ." *Moviecolor Ltd. v. Eastman Kodak Co.*, 288 F.2d 80, 83 (2d Cir. 1961), *cert denied* 368 U.S. 821 (1961); *Turner v. Lundquist*, 377 F.2d 44, 46 (9th Cir. 1967).

** On July 18, 1969, Richard could have sought injunctive relief, see, e.g., *Piper v. Chris-Craft Industries, Inc.*, 97 S.Ct. 926, 949 (1977), citing *Electronic Specialty Co. v. International Controls Corp.*, 409 F.2d 937, 947 (2d Cir. 1969).

POINT II

The statute of limitations was not tolled as to Richard's action.

Richard was attorney for his wife Lillian when her application to have *Stull v. Pool* declared a class action was denied.* He made no effort to intervene in such action but instead waited for almost a year thereafter and, after the applicable statute of limitations expired, commenced the instant action purportedly on behalf of the same class based on the same facts.

Despite the holding of *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), Richard argues (App. Br. pp. 21-29) that his action was timely filed because the running of the statute of limitations was suspended from the commencement of *Stull v. Pool* until class action status was denied approximately two years later.** Richard contends the District Court's holding that the tolling benefit was available only to those members of the class who intervened in *Stull v. Pool* was too "limited" and incorrect.

In *American Pipe* the Supreme Court held as follows (414 U.S. at 552-553) (emphasis added):

"We hold that in this posture, at least where class action status has been denied solely because of failure to demonstrate that 'the class is so numerous that joinder of all members is impracticable,' the commencement of the original class suit *tolls the running of the statute for all purported members of the class who*

* 63 F.R.D. 702 (S.D.N.Y. 1974).

** First Boston was not a defendant in *Stull v. Pool* and therefore Richard has no tolling argument as to it. See *Arneil v. Ramsey*, CCH Fed. Sec. L. Rep. ¶ 95,865 [76-77 Transfer Binder], page 91,182 n.10 (2d Cir. 1977).

make timely motions to intervene after the court has found the suit inappropriate for class action status."

The Supreme Court recognized that its decision was a limited exception to the general rule against tolling (*id.* at 552-56),* with Justice Stewart emphasizing that only those members of the purported class who subsequently moved to intervene in the existing action would receive the benefit of the tolling. *Id.* at 552 n.22.

Class action status in *Stull v. Pool* was denied because of lack of a proper representative, not because of the absence of numerosity. But even assuming that the *American Pipe* exception applies,** Richard could not utilize the doctrine, since he made no effort to intervene. If the plaintiff in *American Pipe* must intervene to press an individual claim in order to toll the statute, surely Richard was compelled to intervene to press the same claim on behalf of the same class.***

This Court recently recognized the limitations of the *American Pipe* exception when it refused to toll the statute for a private plaintiff who had notice of a possible claim for five years and yet took no action either to sue or to intervene in a related class action until after the statute

* See *Kavanagh v. Noble*, 332 U.S. 535, 539 (1947); *Monarch Asphalt Sales Co., Inc. v. Wilshire Oil Co. of Texas*, 511 F.2d 1073, 1079 (10th Cir. 1975).

** *American Pipe*, *supra* at 553. Further, the tolling rule established in *American Pipe* was applied where the statute of limitations had expired *before* class status was denied. Here, the statute of limitations expired more than a year *after* class status had been denied in the prior action.

*** If Richard is allowed to commence a new class action after his claim has been time-barred, another Piper shareholder could commence a subsequent action if class status is denied. Such a procedure would result in a proliferation of actions contrary to primary object of Rule 23, Fed. R. Civ.P., and contrary to the holding of *American Pipe*, *id.* at 552-53.

of limitations had run. *Arneil v. Ramsey*, CCH Fed. Sec. L. Rep. ¶95,865 at 91,182-83 [’76-77 Transfer Binder] (2d Cir. 1977).^{*} Thus, where a plaintiff has notice that class status was denied, the statute will not be tolled, except insofar as is necessary to enable him to make a timely motion to intervene. *Monarch Asphalt Co., Inc. v. Wilshire Oil Co. of Texas*, *supra*, 511 F.2d at 1078-80; *Miller v. Central Chinchilla Group, Inc.*, 66 F.R.D. 411, 416-17 (S.D. Iowa 1975); *Goldstein v. Regal Crest, Inc.*, 62 F.R.D. 571, 578-580 (E.D. Pa. 1974); 3B *Moore’s Federal Practice* ¶ 23.90, p. 23-1653 n.11 (1976-77 Supplement).

The footnote in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 n.13 (1974),^{**} does not support Richard’s position. (App. Br., pp. 22-23). In *Eisen*, Justice Powell was discussing a situation where class status was *granted* and a member of the class requests exclusion from the class to press his claim separately. Because of due process requirements, Rule 23(c)(2) and (c)(3) allow a person to exclude himself from the class to pursue his own remedies and no extra burden is placed upon the federal courts not

^{*} “Of especial significance is the fact that the rule of *American Pipe* was intended for the benefit of purported members of the class who sought to *intervene* in the action after class status was denied. The Court noted that a contrary rule ‘would deprive Rule 23 class actions of the efficiency and economy of litigation’ Rule 23 was intended to promote, and would result in a multiplicity of motions by would-be intervenors. 414 U.S. at 553. To suspend the statute in this case, however, would result in the maintenance of another suit by plaintiffs who took no action for almost five years after they were aware of information sufficient to put them on notice of possible fraud by the defendant.” (Emphasis original)

^{**} “¹³ Petitioner also argues that class members will not opt out because the statute of limitations has long since run out on the claims of all class members other than petitioner. This contention is disposed of by our recent decision in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), which established that commencement of a class action tolls the applicable statute of limitations as to all members of the class.”

contemplated by the Rule. A new action is required and appropriate.

Richard's other contentions are equally without merit.*

POINT III

This action should not be permitted to continue.

Richard seeks to recover because he did not accept CCI's offer. As the Supreme Court held in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 746 (1975), such claims for nonaction are inherently speculative. Indeed, Richard's claim here defies logic—it is unclear how BPC's claimed overstatement of the carrying value of an asset on its financial statements could possibly dissuade a Piper shareholder from tendering to CCI, except by persuading the shareholder to tender instead to BPC—but Richard was not persuaded to tender to BPC. Further, Richard has admitted under oath that he never relied on the prospectus that he alleges dissuaded him from tendering to CCI.**

* Both *In Re Master Key Antitrust Litigation*, 70 F.R.D. 29, 32-33 (D. Conn. 1976), and *Agostine v. Sidcon Corporation*, 69 F.R.D. 437, 448 n.13 (E.D. Pa. 1975), involve the maintenance of separate actions after grant of class status. *Hellerstein v. Mather*, 360 F. Supp. 473 (D. Col. 1973), was decided before *American Pipe*. *Escott v. Barchris*, 340 F.2d 731, 734 (2d Cir. 1965), cert. denied sub nom. *Drexel & Co. v. Hall*, 382 U.S. 816 (1965), recognizes that intervention in the existing action is the proper procedure.

** Richard admitted in his deposition that he did not recall ever reading the BPC prospectus that contained the alleged omissions (CA 159) and that, in fact, he did not accept either CCI's or BPC's offers because he hoped that if he held on, he would get a better price for his Piper shares. (CA 156) By conceding that it was his own investment decision, rather than the actions of any defendant, that caused him not to accept the CCI offers, Richard has conclusively established non-reliance, requiring a dismissal of his complaint. *Titan Group, Inc. v. Faggen*, 513 F.2d 234, 238 (2d Cir. 1975); *Rochez Brothers, Inc. v. Rhoades*, 491 F.2d 402, 410 (3d Cir. 1974).

Richard's claim for alleged injury is untenable, particularly since he never would have tendered to CCI. During the pendency of the CCI offer, Richard, as attorney for his wife Lillian, alleged that the CCI offer was a "self-dealing operation" to acquire Piper shares "for less than fair value" (CA 305, 316, 328) and was "grossly and unconscionably inadequate." (CA 347, 382) In this connection, Richard's reversal of factual allegations—he here claims he was dissuaded from accepting the *advantageous* CCI offer—clearly renders him an inadequate representative of the purported class.

This problem was noted by Judge Owen in *Stull v. Pool*, 63 F.R.D. 702, 704-05 (S.D.N.Y. 1974), where Lillian was held to be an unsuitable class representative. If Lillian was unsuitable, Richard would be worse.

Over eight years have passed since the CCI-BPC contest for control of Piper. By this action, Richard purports to represent a class of shareholders who, in the face of widespread publicity of alleged violations of the securities laws, have never complained. Not a single Piper shareholder other than Richard and his wife Lillian has come forward to claim injury resulting from the contest for control.

Aside from all the legal deficiencies of Richard's claim, it clearly would "amount to a waste of judicial manpower" to allow this case to continue, *Seergy v. Kings County Republican County Committee*, 459 F.2d 308, 313 (2d Cir. 1972).

CONCLUSION

For each of the reasons set forth above, the decision of the District Court should be affirmed.

Respectfully submitted,

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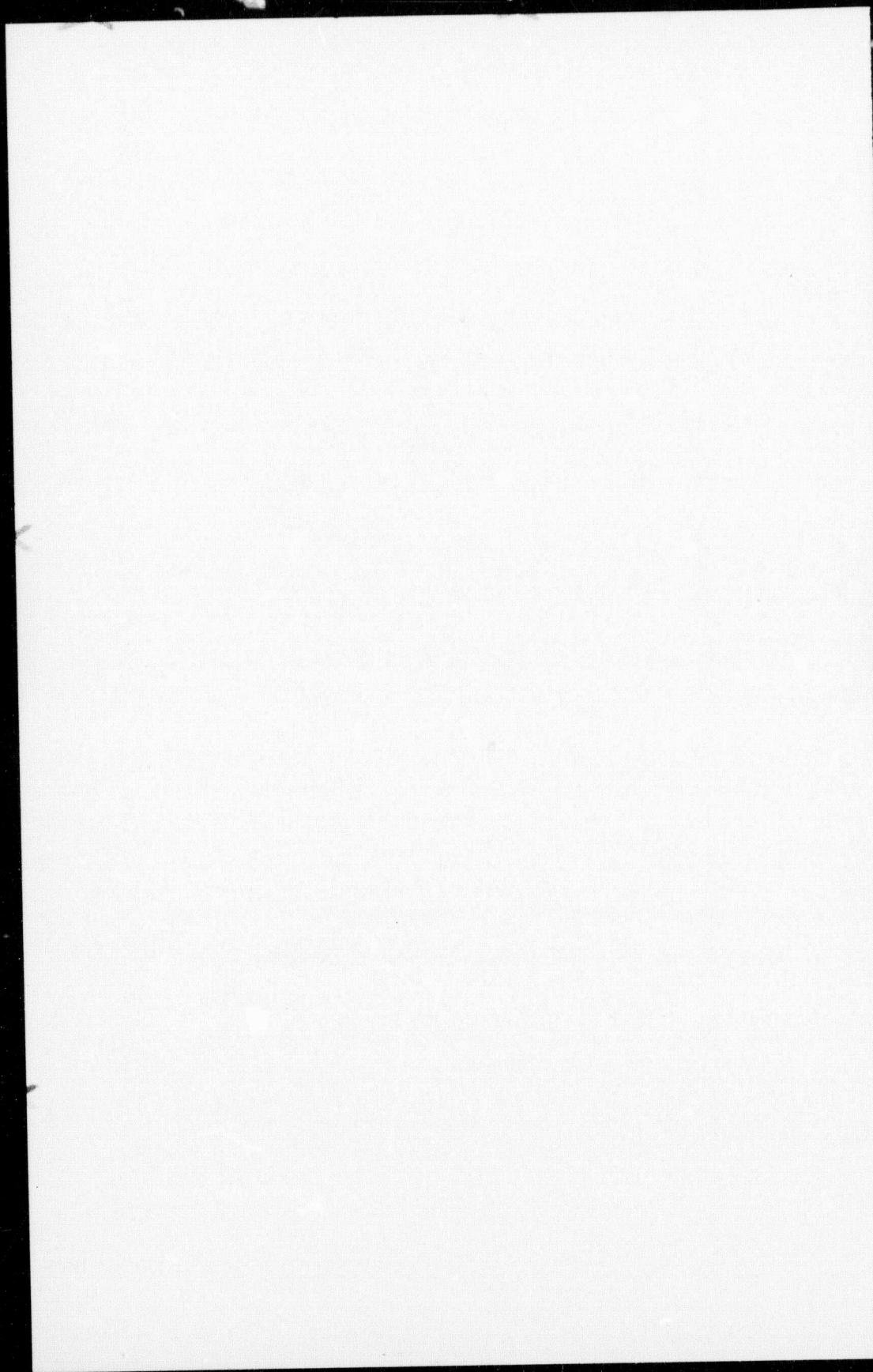
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May 9, 1977

Certificate.

I, REX W. MIXON, JR., an associate of the firm of Rogers & Wells, attorneys for defendant-appellee Bangor Punta Corporation, hereby certify that a true and correct copy of the foregoing Joint Answering Brief for Defendants-Appellees has been served by mailing two copies thereof on this 9th day of May 1977 to Demov, Morris, Levin & Shein, attorneys for plaintiff-appellant Richard J. Stull, 40 West 57th Street, New York, New York 10019.

/s/ REX W. MIXON, JR.
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